SUPREME COURT, U. S.
SEP 17 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-102

REUBEN J. KATZ, on behalf of himself and all others similarly situated,

Petitioner,

v.

CARTE BLANCHE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT CARTE BLANCHE CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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At the time Respondent filed its Brief in the captioned matter, the Court of Appeals for the Third Circuit en banc had not yet decided the Petition for Writ of Mandamus filed with it by Petitioner. On September 11, 1974, a decision in favor of Respondent was rendered on that Petition for Mandamus and it was denied.

The Order of the Court of Appeals en banc and its Opinion are reproduced below.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 74-1563

REUBEN J. KATZ, on behalf of himself and all others similarly situated,
Petitioner

vs.

HUBERT I. TEITELBAUM, UNITED STATES DISTRICT JUDGE, WESTERN DISTRICT OF PENNSYLVANIA,
Nominal Respondent

CARTE BLANCHE CORPORATION,
Respondent

Present: SIETZ, *Chief Judge* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS AND GARTH, *Circuit Judges*

Upon consideration of petitioner's application for writ of mandamus and the answer of the respondent in opposition thereto, both in the above-entitled case,

It is ORDERED that petitioner's application for writ of mandamus be, and hereby is denied, in accordance with the opinion of this Court.

ATTEST: /s/ THOMAS F. QUINN
Clerk

September 11, 1974

OPINION OF THE COURT
(Filed Sep. 11, 1974)

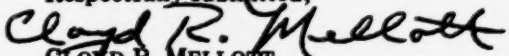
PER CURIAM

Petitioner Katz seeks a writ of mandamus to compel the nominal respondent, The Honorable Hubert I. Teitelbaum, Judge of the United States District Court for the Western District of Pennsylvania, to apply the law announced by the Supreme Court in *Eisen v. Carlisle & Jacquelin*, 42 U.S.L.W. 4804 (U.S., May 28, 1974), which petitioner contends is inconsistent with the mandate of this court in *Katz v. Carte Blanche Corp.*, No. 72-1054 (3d Cir., filed March 15, 1974). In opposition to the petition, the defendant Carte Blanche urges first, that there is no such inconsistency and second, that use of a petition for a writ of mandamus to obtain an interlocutroy declaration from this court on the effect of the *Eisen* decision would be an improper use of the writ.

If in fact the mandate of this court in *Katz v. Carte Blanche, supra* is inconsistent with a subsequent decision of the Supreme Court, it is clear that the law announced by that higher authority, rather than this court's mandate, will be the appropriate rule of decision. The controlling effect of the mandate from a higher to a lower court is an application of the law of the case doctrine, and that doctrine yields to the authority of a source of law higher than that of the court which issued the mandate. *See Banco Nacional de Cuba v. Sabbatino*, 383 F.2d (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *United States v. Butenko and Ivanov*, 494 F.2d 593, 693 (3d Cir. 1974) (Gibbons, J. dissenting). We have no doubt that Judge Teitelbaum, aware that the mandate of this court in no way limits his authority to consider the effect of the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin, supra*, will give that decision appropriate consideration in his

rulings during the further progress of this case. We express no opinion at this time as to the effect of the *Eisen* opinion on those rulings. Under the circumstances we see no need for the issuance of a writ.

Respectfully submitted,



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